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NO. ....354..

In the
SUPREME COURT OF THE UNITED STATES.

CALVERT ALLEN LACY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNSEL FOR PETITIONER

INDEX

	Page
Opinions Below	4
Jurisdiction	4
Questions Presented	5
Constitutional Amendments and Statutes Involved	7
Statement	9
Conclusion	10
Appendix I	I-1--I-2
Appendix II	II-1--II-2
Appendix III	III-1--III-7

AUTHORITIES

Title 18, U.S.C.A., Section 1254(1).. 5

Title 18, U.S.C.A., Section 2421..... 8

Sixth Amendment to the Constitution of the United States..... 7

Fourteenth Amendment to the Constitution of the United States, Section 1..... 7

NO. .....

In the
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CALVERT ALLEN LACY,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Mr. Justice Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now CALVERT ALLEN LACY, hereinafter called Petitioner, and files this his petition for writ of certiorari. A writ of Certiorari is respectfully sought to review the judgment of the United

States Court of Appeals for the Fifth Circuit, entered in this cause on the 22nd day of April, 1969.

I.
OPINIONS BELOW

A judgment of the United States District Court was entered on the 11th day of April, 1969. A timely notice of appeal was filed on the 12th day of April, 1969. A record of appeal was docketed in the Court of Appeals and the judgment affirming the district court was entered on the 22nd day of April, 1969. The petitioner's motion for rehearing in the Court of Appeals was denied on the 10th day of June, 1969, without the court rendering an opinion.

II.
JURISDICTION

This court has jurisdiction to review

the order herein by writ of certiorari under Title 28, U.S.C.A., Section 1254(1).

III.
QUESTIONS PRESENTED

Petitioner, a defendant in a criminal case, was tried and found guilty along with another defendant in the United States District Court of a violation of the White Slave Traffic Act, Title 18, U.S.C.A., Section 2421. Petitioner states that he in no way violated or intended to violate the Act and that the finding of guilty was nothing more than guilt by association with the other defendant, CHARLES RAYMON ODEN. Petitioner contends that there is no evidence of his guilt except through hearsay and innuendo. Under these circumstances, petitioner was deprived of the

following rights:

1. The right under the Sixth Amendment to an impartial jury was violated when the court abused its discretion in not severing the defendants.

2. The right under the Sixth Amendment to be tried in the State and district where the alleged crime was committed.

3. The right under the Sixth Amendment to a speedy and public trial.

4. The right to the due process clause and equal protection clause of the Fourteenth Amendment in that he was convicted on a record barren of any evidence of guilt.

IV.
CONSTITUTIONAL AMENDMENTS and STATUTES INVOLVED

The Constitution Amendments and statutes which are involved in this case are set out as follows:

The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Statute authority which is involved in this case is Title 18, U.S.C.A., Section 2421:

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets,

> or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States--"

V.
STATEMENT

The facts in the present case are as follows: Petitioner Lacy, along with the Defendant Oden, was tried in the Federal District Court in Lubbock, Texas, under the White Slave Traffic Act, Title 18, U.S.C.A., Article 2421. The Peti-

tioner Lacy and Defendant Oden were found guilty of transporting a woman across a State line for immoral purposes.

On or about the 2nd day of March, 1946, the Petitioner Lacy lived in Hobbs, New Mexico. The Defendant Oden called Petitioner Lacy from Lubbock, Texas, telling him that he was broke and asked Petitioner Lacy to come to Lubbock, Texas, and get Defendant Oden and his "Ole Lady" because they were broke and had no money to get to Hobbs, New Mexico, where they could obtain jobs.

Petitioner Lacy, along with three other men, responded to the telephone call and went to Lubbock, Texas, where they met Defendant Oden and his "Ole Lady". The group, after a considerable amount of drinking, returned to Hobbs,

New Mexico.

The evidence was clear that Petitioner Lacy did not own the car that was used in the trip, but it was owned by one of the men who went along with the group to Lubbock, Texas. Petitioner Lacy did not receive any benefits from Defendant Oden or his "Ole Lady", as a matter of fact, the "Ole Lady" of Defendant Oden testified that she had only seen Petitioner Lacy four or five times and these were after this first meeting.

The majority of the testimony that was given at the trial was concerning Oden. This testimony included the statements of Defendant Oden's "Ole Lady" testifying of the atrocities and numerous acts of violence that were committed upon her by Defendant Oden, at no time did she

implicate the Petitioner Lacy.

VI.
REASONS FOR GRANTING THE WRIT

Petitioner Lacy seeks to show the court that he committed no crime under Title 18, U.S.C.A., Article 2421. This Act requires certain elements to be present before a crime can come into existance. The first element, "Whoever knowingly transports in interstate or foreign commerce...", second "...any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose...", and third, "...with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute..." Petitioner states to the court that he committed none of the elements. That if the petitioner is

guilty under the facts in this case, then all drivers for public transportation that cross State lines with a prostitute aboard would be guilty of a violation of the White Slave Traffic Act, even though they lacked the intent and purpose to commit the act. In the present case not one of the elements were proven against the Petitioner. The only way these were shown was by evidence against the Defendant Oden and as such, they applied as hearsay and innuedoes to Petitioner Lacy. Petitioner Lacy relies upon these facts as presented above to show the court that the due process clause and equal protection clause of the Fourteenth Amendment was violated in that he was convicted on a record barren of any evidence of guilt.

Petitioner Lacy would also show the court that his rights under the Sixth Amendment have been violated by the courts refusal to sever the defendants. With the Sixth Amendment being written in a singular person and not in the plural, it guarantees the person to be a single defendant in a single trial. The Sixth Amendment is applicable to all criminal prosecutions and as such it guarantees the person to be a single defendant even though a group may be charged with the crime. There is ample evidence to support a single trial by a single defendant through the Sixth Amendment, particularly the words, "the accused", "trial", "him", and "his".

The most important clause of the Sixth Amendment which states "...by an impartial

jury of the State and district wherein the crime shall have been committed..." is probably the heart of the Sixth Amendment. This clause guarantees that a man can go before an impartial jury, knowing that he will get a fair trial, because the jury will favor neither the defendant nor the government. This in effect means a single trial for a single defendant. This means that in a trial of two defendants, where one of the defendants is not as abhorent to the jury as the other, or does not have such a bad reputation, or be guilty of the atrocities committed during the actual crime, then the more appealing defendant does not have an impartial jury, because the jury has been inflammed over the testimony that was offered against one of the

defendants. This in effect unjustly causes the jury to be partial to the governments case. Thus, the defendant that is innocent of the atrocities committed, does not have an impartial jury that is guaranteed under the Sixth Amendment.

In this particular case the jury was partial toward the Government because Petitioner Lacy was forced to trial with the Defendant Oden who had the worst kind of record and reputation. Naturally, such evidence cannot be removed or disregarded from the minds of the jurors by instructions from the bench because jurors are only human beings whose minds are easily prejudiced.

The Petitioner Lacy was found guilty not because of his guilty, but because of

his association, and, more horribly, because of the purest and rankest form of hearsay evidence. (Transcript 110-123). The Government could not have sought or obtained a conviction of the Petitioner Lacy had they not combined the two indictments. The court can plainly see by re-examination of the transcript that this was not a trial of the Petitioner, but of the Defendant Oden. The transcript is almost entirely about the Defendant Oden and his actions before and after the alleged crime. As far as the transcript is concerned, the Petitioner Lacy did nothing more than any other of the witnesses that were in the car that testified against the Petitioner Lacy and the Defendant Oden. The big question here is why the Government did not prosecute

all the persons in the automobile instead of using some as witnesses and others as defendants, unless they wanted to get some one as it so plainly states in the transcript. (Transcript 261-263).

The second part of the Sixth Amendment clause, "...to be tried in the State and district wherein the crime shall have been committed..." is the most important. This was not so in the present case in that the Petitioner Lacy was not tried in the State or district where the alleged crime took place. The Petitioner was tried in Lubbock, Texas, while the alleged crime took place in New Mexico. The Petitioner Lacy was charged with the crime of transporting a woman across a State line for immoral purposes. The Petitioner's Sixth Amendment rights have

been violated since he was not tried in the State and district where the alleged crime took place; because the crime could never have taken place until they crossed into the State of New Mexico; thus, the crime never occurred in Texas. Under the White Slave Traffic Act, if the Petitioner Lacy and the Defendant Oden, and the witnesses never crossed the State line, then charges under this particular Act could never have been brought because the alleged crime never occurred.

Petitioner Lacy also seeks to show the court that his rights under the Sixth Amendment, which pertain to a speedy and public trial, have been violated in that the alleged crime took place on the 29th day of February, 1964, and it was not until the 8th day of April, 1968, that

Petitioner was finally allowed to be tried for the alleged offence.

CONCLUSION

WHEREFORE, Petitioner Lacy requests that the writ of certiorari be granted.

Respectfully submitted,

GERALD K. FUGIT
412 North Texas
Odessa, Texas 79760

COUNSEL FOR PETITIONER

CERTIFICATE

A copy of the foregoing petition for writ of certiorari has been deposited in the United States mail in a properly stamped envelope addressed to ROBERT S. TRAVIS, Assistant United States Attorney, 206 U. S. Courthouse, Fort Worth, Texas 76102, this 17 day of July A. D. 1969.

Gerald K. Fugit

GERALD K. FUGIT

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 26216

CALVERT ALLEN LACY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appealed from the United States District Court for the Northern District of Texas

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(June 10, 1969)

ON PETITION FOR REHEARING

Before ANISWORTH and SIMPSON, Circuit Judges and MITCHELL, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

numbered cause be and the same is hereby denied.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 26216

D. C. Docket No. CR 5-224

CHARLES RAYMON ODEN and
CALVERT ALLEN LACY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appealed from the United States District Court for the Northern District of Texas.

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 22, 1969.

Issued as Mandate: May 14, 1969
as to appellant Charles Raymon Oden only.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26216

CHARLES RAYMON ODEN and
CALVERT ALLEN LACY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Northern District of Texas

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(April 22, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM: This is an appeal by Charles Oden and Calvert Lacy from a judgment of the District Court sentencing them to a term of imprisonment of five years for violating Title 18, United States Code, Section 2421, commonly known as the Mann Act.

Appellant Lacy has appealed on the ground that the trial court erred in failing to grant a severance as to him, contending that the evidence was so overwhelming against Oden that it prejudiced the jury against him. This Court has consistently held that this is a matter within the sound discretion of the trial judge, and his decision will not be overturned unless there is an affirmative showing of abuse of discretion.[1]

When the charges against all defendants grow out of the same transactions and may be proved by the same evidence, and the jury is instructed to disregard evidence as to one defendant that does not pertain to the other defendant, the trial court does not abuse its discretion in refusing to grant a severance. Such instructions were given to the jury by the trial judge in this case and, under these circumstances it cannot be said that the trial judge abused his discretion in refusing to grant a severance as to Lacy.

Appellant Oden has appealed on several grounds. First, he urges that he was denied a speedy trial in violation of the Sixth Amendment, Rule 48(b) of the Federal Rules of Criminal Procedure, and the due process clause of the Fifth Amendment.

The offense occurred on February 29, 1964; indictment was returned on July 17, 1967; and trial was commenced on April 8, 1968. The record discloses that the

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[1] *Milam v. United States*, 322 F2d 104 (CA 5-1963); *Garcia v. United States*, 315 F2d 679 (CA 5-1963).

government was unable to locate one of its key witnesses until January, 1968.

In the instant case there is no question that the indictment was returned within the allowable statutory period.[2]

This witness was Ocie Jenkins, the owner and driver for part of the trip of the vehicle which transported the defendants and a woman from Lubbock, Texas to Hobbs, New Mexico for the purpose of prostitution. His testimony was essential for the prosecution of the Government's case.

Both this circuit and the eighth circuit have held that the provisions of the Sixth Amendment guaranteeing a speedy trial contemplate undue delay in the prosecution of a pending charge and not the mere delay in the filing of a possible criminal charge.

This court held in *Harlow v. United States:*[3]

> "It is well established that the right to a speedy trial guaranteed by the Sixth Amendment and implemented by Rule 48(b) of the Federal

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[2] 18 USC 3282 provides for a five year limitation period between the date of the offense and the return of the indictment. Previously there was only a three year statute of limitations. The 1954 amendment demonstrates the intent of Congress to lengthen the statutory period during which indictments or information may be instituted.

[3] 301 F2d 361 (CA 5-1962), cert. den. 371 US 814, 83 S. Ct. (1962); See also *Bruce v. United States*, 351 F2d 318 (CA 5-1965); *Mack v. United States*, 326 F2d 481 (CA 8-1964) cert. den. 377 US 947, 84 S. Ct. 1355 (1964).

> Rules of Criminal Procedure, 18 U.S.C.A. does not arise until after a prosecution is instituted against the accused. Any delay occurring between commission of the offense and commencement of prosecution is controlled exclusively by the applicable Statute of Limitations. Hoopengarner v. United States, 6 Cir., 270 F.2d 465."

A fortiori, appellant Oden's contention that he was denied a speedy trial must fall.

In *United States v. Fay*,[4] the court stated:

> "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the length of delay, the reason for the delay, the prejudice to the defendant, and waiver by the defendant."

Thus, the length of time between date of indictment and date of trial must be viewed with other factors and where, as in instant case, the delay is less than a year and there is no showing of prejudice to the defendant, there is no denial of due process. There is nothing in the record to indicate any dilatory action on the part of any government agency which prejudice appellant in the preparation of his case.

The remaining ground on appeal is whether the trial judge erred in admitting evidence pertaining to various

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[4] 313 F2d 620 (CA 2-1963).

acts of violence committed by Oden on two of the witnesses several months after the alleged interstate transportation of Flakey Jo Goodin Cooper for an immoral purpose.

These acts include the beating of the prostitute with a coat hanger in a shower when she attempted to escape; directing a pistol at another man's head; and the kidnapping, beating, and shooting of Charlie Williams when appellant Oden was unable to locate the prostitute Flakey Jo Goodin Cooper.

In *Flanagan v. United States*,[5] this court held:

> "The evidence complained of related to acts occurring either shortly before or shortly after the offense charged in the indictment, and such evidence is material in the determination of intent, because 'the purpose for which the interstate transportation is undertaken may be inferred from the conduct of the parties within a reasonable time before and after the transportation."

and in *Lindsey v. United States*,[6] wherein the court noted:

> "Because of its relevance, the law recognizes the necessity for safeguards against the use of evidence of prior criminal acts where, in re-

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[5]308 F2d 841 (CA 5-1962).
[6]227 F2d 113 (CA 5-1955).

lation to the charge under scrutiny, its use merely tends to prove that the defendant is bad, given to unlawful acts or disposition and, because so disposed, he must be guilty of the act then being tried (citing authority). But where the prior acts bear sufficient similarity to the one under inquiry and are not too remote in point of time, evidence of such prior acts, notwithstanding their criminality, are admissible on the issue of the intent with which an act was done where intent, as such, is a critical ingredient of the offense charged."

An analogous situation existed before this court in the case of *Cohen v. United States.*[7] In Cohen, evidence of the appellant's acts of misconduct during two marriages, which consisted of securing employment for his wives in houses of prostitution was held admissible to show the intent of the accused to violate the Mann Act. In the instant case, the evidence is not only less remote in point of time but clearly establishes the criminal intent of Oden to violate the Mann Act.

It is therefore clear that evidence of another crime unconnected with the one on trial is admissible when the evidence of the other offense by the accused demonstrates the criminal intent of the accused as to the offense charged when the other offenses are similar to and not too remote in point of time.[8]

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[7] 120 F2d 139 (CA 5-1941).

[8] *Weiss v. United States*, 122 F2d 675, 682 (CA 5-1941); see also *Cohen v. United States, supra*

As the acts of misconduct of the appellant Oden demonstrated a scheme of criminal intent and were not too remote in point of time, they were properly admitted to show such a scheme or plan to violate the law and to demonstrate the criminal intent of the appellant Oden.

The judgment is affirmed.

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